IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a Revision Application in terms of Article 138 of The Constitution.

Court of Appeal No:

CPA 0004/23

High Court Kegalle

Case No: REV/6052/2020

Magistrate's Court Warakapola

Case No: 1427

Officer-in-Charge,

Police station,

Dedigama.

COMPLAINANT

Vs.

Gamaralalage Chamara Jayaruwan

Bandara

No. D/95/2, near Hospital,

Mahapallegama.

ACCUSED

AND

Nadeeka Vijithangani Assalla

Ambepussa,

Warakapola.

REGISTERED OWNER CLAIMANT

AND THEN BETWEEN

Nadeeka Vijithangani Assalla

Ambepussa,

Warakapola.

REGISTERED OWNER CLAIMANT-PETITIONER

Vs.

1. Officer-in-Charge,

Police station,

Dedigama.

COMPLAINANT-RESPONDENT

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

2ND RESPONDENT

AND NOW BETWEEN

Nadeeka Vijithangani Assalla

Ambepussa,

Warakapola.

REGISTERED OWNER CLAIMANT-PETITIONER-PETITIONER

Vs.

1. Officer-in-Charge,

Police station,

Dedigama.

COMPLAINANT-RESPONDENT-RESPONDENT

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

2ND RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Asela Serasinghe for the petitioner

: Jehan Gunasekara, S.C. for the respondent

Argued on : 27-07-2023

Decided on : 08-11-2023

Sampath B. Abayakoon, J.

This is an application by the registered owner claimant-petitioner-petitioner (hereinafter referred to as the petitioner) invoking the revisionary jurisdiction granted to this Court by Article 138 of The Constitution.

The petitioner is seeking to challenge and set aside the order dated 16-12-2022 pronounced by the learned High Court Judge of Kegalle in the Revision Application Number REV/6052/2020 filed before the Provincial High Court of

the Sabaragamuwa Province Holden in Kegalle, where the application by the petitioner was dismissed.

The petitioner is also seeking to get the order dated 28-09-2020 pronounced by the learned Magistrate of Warakapola set aside, wherein, the vehicle belonging to the petitioner was ordered to be confiscated.

The petitioner is the registered owner of the vehicle bearing registration number 224-4461, which is a vehicle categorized as a boom truck.

One Gamaralalage Chamara Jayaruwan Bandara was charged before the Magistrate's Court of Warakapola for having transported six Mahogany logs valued at Rs. 22026.69 without a valid permit in the above-mentioned truck, and thereby committing an offence punishable under section 25(a) read with section 40(a) of the Forest Ordinance as amended.

The accused had pleaded guilty to the charge and had been sentenced.

Thereafter, the learned Magistrate of Warakapola has permitted the registered owner of the vehicle, namely the petitioner, to show cause as to why the said vehicle should not be confiscated.

At the inquiry held in that regard, the registered owner has given evidence and has stated that she purchased this vehicle in December 2016 by partly financing it with a finance company. She has engaged this boom truck, primarily for transportation of concrete rings and other concrete products to various places for hire. In addition, the vehicle also has been used for transporting machines belonging to MAS factory when needed, for necessary repairs to their Panadura repairing facility.

She has stated that she had been paying the lease rental out of the money earned by using the vehicle for hiring purposes, and she used to engage the services of the accused since 2019 on daily wage basis if and when his services are required. It has been her evidence that the vehicle was used not on a regular basis but only when required.

On 09-02-2020, the driver has informed of a necessary engine repair to the vehicle, and with her consent he has taken the vehicle to a place called Oththapitiya Motors in Thulhiriya area. She has paid Rs. 3000/- for the repairs and had produced the relevant receipt marked as E-3. After bringing the vehicle back, it has been taken again to a place called Lal Motors situated near the Tholangamuwa School for further repairs and it had been at the Lal Motors for two days. The petitioner has paid Rs. 22500/- as repairing fees to Lal Motors, the receipt which had been produced marked as E-4.

According to her evidence, the Lal Motors had called the petitioner around 4.00 pm on 11-02-2020 and had informed that the repair has been completed. She has then called her driver and asked him to go to the said Lal Motors and bring the vehicle back to her home. Since the vehicle has not returned until 6.30 – 7.00 in the evening, she has called the driver and had been informed that the vehicle is in police custody. Since it was nighttime, the petitioner has informed her brother to look into the matter and has come to know that the vehicle has been taken into police custody for transporting some timber.

It has been her position that she used to be vigilant about her vehicle and used to call frequently when the vehicle is taken out on hires and the vehicle had never been subjected to an offence like this previously. Stating that this is her only way of earning a living, she has sought the release of the vehicle to her.

Although the prosecution has suggested that she was not telling the truth, she has been consistent with her stand that it was not so, and the vehicle was not used for transporting logs but only for transporting concrete products. She has stated that when asked from the driver, he informed that the logs were loaded in a place called Mahapallegama, which was about 12 kilometers away from Tholangamuwa.

While the registered owner being cross-examined, the learned Magistrate has inquired as to the time of arrest. According to police entries, time of arrest had been at 20.00 hours, which is 8.00 pm in the night.

Pronouncing his order, the learned Magistrate had concluded that the registered owner might not have had the knowledge of this offence being committed by the driver. The relevant portion of the order reads as follows.

> "සවස 4.00 සිට 6.30-7.00 කාලය තුල එම රථය කුමන ස්ථානයක තිබුනේද යන්න ඉල්ලුම්කාරිය නොදනී. රියැදුරුට පණිවිඩය ලබා දීමෙන් පසුව ඔහු විසින් නියමිත කටයුතු ඉටු කරනු ඇති ඇය අපේක්ෂා කලා විය හැකිය. එසේම සොයාබැලීම යන්න එම රථය පසුපසින් ගොස් සොයාබැලීමක් හෝ නිතර නිතර රියැදුරුගෙන් ඒ පිළිබඳ විමසීමක් හෝ වෙනත් තැනැත්තෙකු එම රථය සම්බන්දයෙන් නිරන්තරෙන් සොයාබැලීමට යෙදවීමක් අධිකරණය අපේක්ෂා නොකල යුතුය. මන්ද සත්භාවයෙන් යම් කටයුත්තක් යමෙකුට පැවරූ පසු ඔහු එය කරනු ඇනැයි ඇයට අපේක්ෂාවක් ඇති විය හැකි බැවිනි. එම කරුණු අනුව ඇය මෙම වරද සම්බන්දයෙන් නොදැන සිටි බවට යම් ආකාරයක අනුමිතියක් ජනිත වේ."

After having determined as above, the learned Magistrate has proceeded to confiscate the vehicle on the basis that the evidence of the petitioner had been that she was vigilant over the vehicle, but has failed to call the driver of the vehicle in order to establish that she used to call him frequently. The learned Magistrate has also doubted the version of events by the petitioner on the basis that the vehicle had been detained some 12 kilometers away from the garage mentioned by the petitioner and there is no possibility for such an occurrence. Going by the time of arrest that has been recorded by the police, it has been further determined that her evidence as to the time she came to know about the arrest cannot be believed. After having considered the evidence and the relevant law, the learned Magistrate has determined that the registered owner has failed to establish that she took the necessary preventive measures to prevent the offence being committed. The vehicle has been confiscated on that basis.

The petitioner has challenged the said order by way of a revision application before the Provincial High Court of Sabaragamuwa Holden in Kegalle.

The learned High Court Judge of Kegalle agreeing with the determination of the learned Magistrate had determined that in terms of section 40(1) of the Forest

Act as amended, the petitioner has failed to establish that she took all precautions to prevent the offence being committed and since the petitioner has failed to call the owner of the garage where she says the vehicle was repaired and even the driver of the vehicle to give evidence on her behalf, she has failed to show sufficient cause before the learned Magistrate. The revision application has been dismissed accordingly.

When the present revision application filed before this Court was supported for notice, this Court granted notice after considering the relevant facts and the circumstances. Accordingly, the respondents filed their objections.

At the hearing of this application, it was the contention of the learned Counsel for the petitioner that the evidence placed before the Magistrate's Court was sufficient for the petitioner to establish the requirements of the proviso of section 40(1) of the Forest Ordinance. It was the position of the learned Counsel that the vehicle was not a vehicle that was used for transportation of any item which require a permit to transport, but only concrete products, and during the time of the detection, the vehicle had been under repairs and the registered owner had only expected and informed the driver to being it back to her house after repairs. The learned Counsel contended that the learned Magistrate should have considered the evidence in that perspective, and the learned High Court Judge was not correct in the determination that the learned Magistrate had pronounced the order of confiscation after considering the relevant facts and the law.

The section 40(1) of the Forest Ordinance amended by Forest (Amendment) Act No. 65 of 2009 reads as follows.

40(1). Where any person is convicted of a forest offence-

(a) All timber or forest produce which is not the property of the state in respect of which such offence has been committed; and

(b) All tools, vehicles, implements, cattle, and machine used in committing such offence,

shall in addition to any other punishment specified for such offence, be confiscated by order of the convicting Magistrate.

Provided that in any case where the owner of such tools, vehicle, implements and machines used in the commission of such offence, is a third party, no order of confiscation shall made if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence.

In the case of **Orient Financial Services Corporation Ltd. Vs. Attorney General, SC Appeal No 120/2011 decided on 10-12-2013 Piyasath Dep, P.C., J.** (As he was then) observed as follows;

> *"The Supreme Court has consistently followed the case of Manawadu Vs. The Attorney General. Therefore, it is settled law that before an order for forfeiture is made, the owner should be given an opportunity to show cause. If the owner on the balance of probability satisfies the Court that he has taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor he was privy to the commission of the offence, then the vehicle has to be released to the owner."*

Although this is a judgement pronounced considering the relevant provisions of section 40(1) of the Forest Ordinance before it was amended by the Forest (Amendment) Act No. 65 of 2009, it is my considered view that the underlying principles that should be considered would be the same, since an offence of this nature can still take place even after taking necessary precautions to prevent a crime being committed without the knowledge of its owner.

Although the learned Magistrate as well as the learned High Court Judge has found fault with the registered owner for failing to call the owner of the place

where the vehicle was repaired and the driver of the vehicle to substantiate her evidence, it is settled law that it is the quality of the evidence that matters and not the numbers.

The relevant section 134 of the Evidence Ordinance reads as follows.

> **134. No particular number of witnesses shall in any case be required for the registered owner of any fact.**

The learned Magistrate has believed the evidence of the petitioner when it was determined that she may not have had the prior knowledge of the offence being committed. It is clear from the evidence of the petitioner that her evidence had not been challenged at material points, and I do not find any basis for the learned Magistrate to believe part of her evidence and to reject some other part.

Her evidence clearly shows that this was not a vehicle that used in any hires that come its way, but for transporting heavy concrete items and other machinery. The vehicle being a boom truck, there is no basis to doubt her evidence in that regard. Her evidence that she asked her driver only to bring the vehicle back from the garage where it had undergone repairs, cannot be disregarded on the basis that the vehicle was detected some 12 kilometers away from the garage.

I am not in agreement with the learned Magistrate's conclusion that her evidence as to the time she came to know about the detention of the vehicle was wrong in relation to the time of arrest that had been recorded in the police notebooks. There is no argument that the vehicle was detained by the police. It is clear from the petitioner's evidence that she had mentioned the times not by looking at a clock but by going by her instincts. I find that the difference in the timeline has not caused any doubt of the evidence by the petitioner.

I am of the view that once the learned Magistrate formed the opinion that the registered owner had no knowledge of the offence being committed and not privy to it, considering whether the registered owner had taken the necessary precautions to prevent the offence been committed should be considered in the

light of the facts and the circumstances relevant to the given situation, and not by giving a strict interpretation to the words "all precautions to prevent the commission of the offence" as stated in the proviso of section 40(1) of the Forest Ordinance as amended.

I am of the view that the evidence should be considered in order to find out whether there is justification in releasing a vehicle to its owner, having in mind that the precautions that an owner of a vehicle can take may vary in a given scenario, and there can always be some other precautions that could have been taken.

Although the learned Magistrate has cited the case of **Sadi Banda Vs. Officer In Charge of Nortonbridge Police Station (2014) 1 SLR 33**, it appears that he has decided not to follow the *ratio decidendi* of the said case on the basis that the effect of the offences of such nature would have to the environment and social fabric should also be considered in a situation like this.

I am of the view that if the learned Magistrate considered all those factors and the judgement of **Sadi Banda Vs. Officer In Charge of Nortonbridge Police Station (supra)** in its correct perspective, there cannot be any justification in confiscating the vehicle belonging to the petitioner.

In the case of **Sadi Banda Vs. Officer In Charge of Nortonbridge Police Station (supra),** it was held,

> *"I have to admit that nowhere in the said inquiry proceedings there is evidence that the appellant had taken all precautions to prevent the commission of the offence. However, at the inquiry the appellant has given evidence and stated, he purchased the lorry on 26-02-2000 and gave it to his son to transport tealeaves. Further stated, that he had no knowledge about transporting of timber. The learned Magistrate in his order has accepted the fact that the appellant did not have any knowledge about the transporting of timber without a permit.*

Nevertheless, the learned Magistrate has confiscated the lorry. I am of the view before making the order of confiscation the learned Magistrate should have taken into consideration, value of the timber transported, no allegations prior to this incident that the lorry had been used for any illegal purpose, that the appellant and or the accused are habitual offenders in this nature and no previous convictions, and the acceptance of the fact that the appellant did not have any knowledge about the transporting of timber without a permit. On these facts the Court is of the view that the confiscation of the lorry is not justifiable."

For the same reasons as considered, I find that the learned High Court Judge of Kegalle was also misdirected as to the relevant facts and the law that should be considered in a matter of this nature, when the revision application of the petitioner was dismissed.

At this juncture, I find it appropriate to quote again from the above-mentioned case of **Sadi Banda Vs. Officer In charge of Nortonbridge Police Station (supra),** which I find relevant under the given context.

"The revisionary power of Court is a discretionary power. This is an extraordinary jurisdiction which is exercised by the Court and the grant of relief is entirely dependent of the Court. The grant of such relief is of course a matter entirely in the discretion of the Court, and always be dependent on the circumstances of each case. Existence of exceptional circumstances is the process by which the extraordinary power of revision should be adopted. The exceptional circumstances would vary from case to case and their degree of exceptionality must be correctly assessed and gauged by Court taking into consideration all antecedent circumstances using the yardstick whether a failure of justice would occur unless revisionary powers are invoked."

Under the circumstances, I am of the view that this is a fit and proper case where the discretionary revisionary jurisdiction of this Court should be exercised in order to prevent a miscarriage of justice.

Accordingly, I set aside the order dated 16-12-2022 pronounced by the learned High Court Judge of Kegalle and the order dated 28-09-2020 pronounced by the learned Magistrate of Warakapola, as both the orders cannot be allowed to stand. I direct that the vehicle numbered 226-4461 shall be released to the petitioner forthwith.

The Registrar of the Court is directed to communicate this judgement to the Magistrate's Court of Warakapola for necessary compliance, and to the Provincial High Court of the Sabaragamuwa Province Holden in Kegalle for necessary information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal